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No. 94-742

In The

Supreme Court of the United States

October Term, 1994

HARLEYSVILLE LIFE INSURANCE COMPANY,

Petitioner,

vs.

NANCY MARDELL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Because of this Court's holding in *McKennon v. Nashville Banner Publishing Company*, No. 93-1543 (decided January 23, 1995), the issue of whether an employee who is dismissed in violation of the ADEA and/or Title VII is barred from obtaining any remedy because of after-acquired evidence by the employer has now been decided.
2. Similarly, the issue of whether the employer is barred from using after-acquired evidence for any reason is now decided. *McKennon, supra.*
3. Once again, in light of *McKennon, supra,* the use of after-acquired evidence for impeachment or any other purpose is now prohibited. This issue therefore is decided as well.
4. Although this Court held, in *McKennon,* that damages should generally be available to the Plaintiff only from the time of termination until the time of the discovery of the after-acquired evidence, Respondent respectfully wishes to challenge the Court's conclusion regarding the appropriateness of the discovery date being the date for cutoff of damages. Additionally, the Respondent wishes to be heard on the natural consequences which will flow from the *McKennon* decision regarding the timing and admissibility of after-acquired evidence, as well as the absolute necessity of mandatory bifurcation at the request of the Plaintiff.
5. Whether the issue of breach of contract as set forth in Petitioner's Reply Memorandum has been preserved for review by this Court, and in any case, whether a contract exists between employee and employer which can be evaluated as suggested by the Petitioner.

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STATEMENT

1. Mardell's Employment

Nancy Mardell (Mardell) was hired by Harleysville Life Insurance Company (Harleysville) as a manager in February 1988. Ms. Mardell's position was to manage the insurance agents under her supervision. At the time Mardell accepted this position, she had been working as an insurance agent for Harleysville's competitors and had eleven years of experience directly related to the insurance field. At the time that Mardell made her application for employment, Respondent believed that she had

received a bachelor's degree from the University of Pittsburgh. However, an examination of her transcript revealed that one class with a related lab was listed as incomplete and thus no diploma has been issued to Mardell. It is uncontradicted by any source however that Ms. Mardell did complete the course work for this class and had turned it in. She therefore assumed that she had completed all of the requirements to obtain her degree. Moreover, the position that Plaintiff was hired for at Harleysville did not require a college degree.

Mardell did not present material misrepresentations about her professional experience. The record indicates that each of the short term jobs listed on the Plaintiff's applications were jobs that the Plaintiff did perform. The only "misrepresentation" was that she was not paid for these positions but rather had taken them as part of obtaining her college credits.

During Mardell's two years of employment, Harleysville, through its management, made many age and sexual bias comments to the Plaintiff. In addition, discovery developed evidence to show that Harleysville's reasons for termination (i.e., poor performance) was unworthy of belief.

Mardell filed charges of age and sex discrimination with the Equal Employment Opportunity Commission and then in the United States District Court for the Western District of Pennsylvania, invoking jurisdiction under Title VII of the Civil Rights Act, 42 U.S.C. Section 2000 e(5), The Age Discrimination and Employment Act, 29 U.S.C. Section 626 and 28 U.S.C. Section 1331 and the

Pennsylvania Human Relations Act, 43 Pa. C.S. Section 1951, *et seq.*

The Defendant admitted that, at the time of the termination, it had no knowledge of the after-acquired evidence at issue. At the time that the issue of alleged resume or application fraud was raised by Harleysville, discovery was already closed. During the continuation of the Plaintiff's deposition after the close of discovery, Mardell indicated her own surprise at not having a college degree and described in detail those jobs at which she did indeed work while in college.

2. The Summary Judgment Motion

Harleysville filed a motion for summary judgment in District Court indicating that Mardell had committed resume fraud which would preclude her from any recovery under Title VII of the Civil Rights Act of 1964 or The Age Discrimination in Employment Act. The District Court followed the Tenth Circuit's decision in *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988), and *Milligan-Jensen v. Michigan Technological Univ.*, 976 F.2d 302 (6th Cir. 1992). The District Court determined that there were no disputes as to whether or not Mardell had made misrepresentations on her resume and job application. Moreover, the District Court went on to determine additional facts which led the Court to determine that had Harleysville known of these misrepresentations it would not have hired the Plaintiff. The Court did not address any issues as to the allegations of discrimination which was presented to the Court by Mardell.

3. The Third Circuit Proceedings

Mardell filed an appeal to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. Section 1291 on June 3, 1993 and oral argument was conducted on December 9, 1993. The Third Circuit opinion reversed the district court's grant of summary judgment. More specifically, the Third Circuit rejected the Tenth Circuit's "Summers Rule" and the holding of the Sixth Circuit in *McKennon v. Nashville Banner Publishing Co.*, 9 F.3d 539 (6th Cir. 1993), *cert. granted*, 114 S. Ct. 2099 (1994), No. 437543. The Circuit held that after acquired evidence such as the evidence Harleysville was attempting to use cannot be a defense to liability in either a Title VII or ADEA case.

> "For all the foregoing reasons, we hold that after-acquired evidence is inadmissiable, because irrelevant, a the *liability* stage of a cause of action brought under Title VII or ADEA. We do not rule out the potentiality that such evidence may serve as the foundation for a claim of fraud, conversion, or the like by the employer against the plaintiff in an appropriate forum, but only that it may not be introduced substantively for the purpose of defending against liability. We must accordingly reverse the district court's grant of summary judgment to Harleysville and remand for further consideration." *Mardell*, supra, Appendix I. to Petition for Certiorari, p. 36a.

The Third Circuit went on to hold that the remedy of back pay should remain intact and Plaintiff, if successful, would be eligible for back pay until the date of judgment. (*Id.*, 37a-42a)

After being denied rehearing, *en banc*, the Defendant petitioned this Honorable Court for a Writ of Certiorari.

SUMMARY OF THE ARGUMENTS

1. Petitioner's Questions 1, 2 and 3 have already been decided by this Court's ruling in *McKennon v. Nashville Publishing Company*, No. 93-1543.

2. The Court should revisit its ruling that damages in an after-acquired evidence case should be cut off on the date of the discovery of that evidence. The Court should also consider the natural effect of this ruling on how and under what circumstances after-acquired evidence will be introduced at trial. Particularly, the Court should be sensitive to the absolute need of Plaintiffs for a bifurcated trial on the issue of liability and damages if after-acquired evidence is to be permitted under those circumstances.

3. The Petitioner may not have properly preserved the issue of the voidability of contract obtained by fraud in the Court below. In any case, it is not clear that a contract existed between the Petitioner and the Respondent upon which the Petitioner can sue for relief. In any case, the Petitioner's requested relief on its argument of a fraudulently obtained contract is *voidability* of that contract. This relief is consistent with the limitation on damages already endorsed by this Court in *McKennon, supra.*

REASONS FOR AND AGAINST GRANTING THE WRIT

1. McKennon Has Already Decided Certain Issues

Certiorari should not be granted on Questions 1, 2 and 3 presented by the Petitioner. This Court's holding in *McKennon v. Nashville Banner Publishing Company*, No. 93-1543, completely resolves the issue of the use of any after-acquired evidence at the liability stage of the trial. This Court first held that because an employer could not have been motivated by knowledge it did not have at the time of a termination, that after-acquired evidence could not be used at the liability phase of a trial to support that termination. *McKennon*, U.S.L.W. 4106. The Court found that previous rulings by the various circuits holding that after-acquired evidence served as a bar to relief for an ADEA Plaintiff were incorrect. (*Id.*, p. 4105) Accordingly, no issue raised by the Petitioner in its first three questions presented has any ongoing validity according to the Court's ruling in *McKennon*.

2. The Remedies Issue

With respect to the issue of damages, it is clear that this Court has taken the first step in drawing a bright line test toward what damages are recoverable in an after-acquired evidence case. Although this Court has urged that the lower Courts adopt a case-by-case analysis regarding that cut-off date (*id.*, p. 4107), the Court's basis for providing this cut-off date stems from its analysis of the "prerogatives" of corporate Defendants to make personnel decisions in the "usual course of its business." Because this Court has stressed its desire to protect

employers in their business dealings, (*Id.*) it seems appropriate to lay the burden upon the employer to prove that it would have discovered the alleged "fraud" in the ordinary course of its business. In a passing reference, this Court seems to suggest that whether or not the employer would have discovered this information but for suit is not a relevant inquiry. (*Id.*, p. 4107) However, the Court also suggests that the important remedial purpose of the ADEA is to "restore the employee to the position which would have been in absent the discrimination." As the dissent in *Welch v. Liberty Machine Works, Inc.*, 23 F.3d 1403 (8th Cir. 1994) [overruled by *McKennon, supra*] persuasively argued, placing the ADEA Plaintiff in the same position that he or she held prior to the discriminatory conduct on the part of the Defendant requires a showing that the employer *would have learned of the alleged fraud absent suit.* 23 F.3d at W.L. at *3 (Arnold, J., dissenting). In order, therefore, to clarify the Court's position, the Court should revisit the issue of whether or not the employer has the burden to show that it would have discovered allegedly fraudulent evidence but for suit in this case.

Additionally, the Court has made no mention nor direction to lower Courts regarding how to handle the introduction of evidence of after-acquired evidence for the purpose of proving damages. It seems clear that any attempt to permit the introduction of after-acquired evidence at the liability stage of an ADEA suit will have the *de facto* consequence of prejudicing the Plaintiff's ability to receive a fair trial on the issue of liability. Allowing introduction during the liability phase of an ADEA case of any after-acquired evidence would therefore emasculate this Court's ruling in *McKennon*. In order to properly

direct the lower Courts, this Court should grant Certiorari on the question of how the introduction of after-acquired evidence should be handled at the trial Court level. Because of its natural tendency that this evidence will prejudice a Plaintiff in an ADEA action, the Respondent here argues that only mandatory bifurcation at the request of a Plaintiff can cure the prejudicial effect of the introduction of such evidence at any time prior to the damage phase of the litigation.

3. The Contract Issue

Finally, in a "Reply" Memorandum filed by the Petitioner to this Court, the Petitioner raises, for the first time, the issue of whether or not Title VII and ADEA cases sound in tort, and whether or not Petitioner has some contractual remedy against the Respondent here. Respondent's review of Petitioner's brief to the Third Circuit Court of Appeals, as well as Petitioner's Petition for Rehearing by the Panel to the Third Circuit demonstrates that this issue was not raised before the Third Circuit Court of Appeals. Although, as pointed out by the Petitioner, the Third Circuit generally addressed issues similar to those raised by the Petitioner's Reply Memorandum, the Respondent takes the position that this issue has not properly been preserved for review by this Court.

Even if the issue has been preserved for review, the Respondent takes the position that there is an incomplete factual record upon which this Court can review the question of whether or not a contract exists or ever existed between the Petitioner and the Respondent. The

Petitioner's Reply Memorandum is devoid of facts which suggest the existence of any written contract between the parties. The Petitioner's Reply Memorandum makes the sweeping assumption there is a contract which exists between the parties, though it cites no facts which support that claim. Among other issues which are not resolved by the Petitioner's late introduction of this question is whether or not a contract can exist between the parties or whether such claim fails for lack of definiteness as to various material elements of this alleged contract including, but not limited to, the time or duration of the contract.

Even if a contract for employment (or otherwise) existed between the Petitioner and the Respondent, the Petitioner's apparent claim for relief would be to have the contract deemed "voidable." (*See*, Petitioner's Reply Memorandum at pp. 1-2.) If the remedy sought by the Petitioner is to have this contract voided by the Court, this remedy would be consistent with the cut-off date already proposed by this Court in the *McKennon* decision. Presumably the Petitioner would have no opportunity to "void" a contract until it had discovered the evidence of alleged fraud; therefore, the *McKennon* discovery date cut-off serves whatever interest the Petitioner is now attempting to advance.

CONCLUSION

For the reason that the issue of when damages should be cut-off has not clearly been established by the *McKennon* decision, and what trial courts should or should not

permit with respect to introduction of this evidence and bifurcation of ADEA trials, Certiorari should be granted. Certiorari should not be granted for the remaining reasons requested by the Petitioner.

Respectfully submitted,

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